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No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANT

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1. Appellees have not rebutted — indeed, they have conceded — the key factors that make their claim presently nonjusticiable.

Our jurisdictional statement pointed out (at 10-12) that although one appellee (Stauffer Chemical Company) had been a party to an arbitration under FIFRA, it was not seeking in this case (or in the separate case brought by its opponent in the arbitration) to change the substance of its arbitral award in any way. Thus, even Stauffer cannot meet the threshold requirement that it show an actual injury and that the requested relief would redress the claimed injury. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-73, 81 (1978).

Appellees confirmed our position when they informed the district court that they "do not challenge the result of any arbitration, nor does the adjudication of [their] claims depend in any manner on the outcome of an arbitration." Memorandum in Support of Plaintiffs' Motion for Reentry of Judgment at 6 (July 16, 1984). They echo that statement in this Court when they argue (Mot. to Aff. 12) that this case does not challenge FIFRA's arbitration scheme but is directed instead against FIFRA's data consideration provisions.

Our point thus stands unchallenged: Appellees seek no relief that would change the result of any arbitration. The fact that Stauffer participated in one such proceeding (in which it obtained a favorable result) is accordingly of no significance. So long as no appellee claims that it has engaged in an arbitration that failed to "vindicate its statutory right to obtain compensation,"[1] their legal claim is no more justiciable than was the identical claim this Court rejected as premature in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984) slip op. 31.

It is insufficient for appellees to allege that Stauffer was "aggrieved" because it was awarded $50 million less than it claimed in its arbitration with PPG Industries, Inc. Wholly absent from the forms of relief Stauffer seeks in this case (and in its defense of PPG's separate case in the United States District Court for the District of Columbia) is a suggestion that the amount it was awarded in the arbitration should be altered.[2] Accordingly, Stauffer is not

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[1]This Court stated in *Ruckelshaus* v. *Monsanto, Co.*, No. 83-196 (June 26, 1984) slip op. 31 (emphasis added) that "the operation of the arbitration procedure affects *only* [the data submitter's] ability to vindicate its statutory right to obtain compensation from a subsequent applicant."

[2]Contrary to appellees' contention (Mot. to Aff. 10, 14), EPA did not concede the correctness of the district court's finding that Stauffer was "aggrieved" by the alleged $50 million shortfall. These findings of fact

"aggrieved" by the amount of the award in any way that it chooses to bring before the federal judiciary. Without such a request for relief, the happenstance of a past arbitration adds nothing to appellees' contention that this case presents a justiciable setting for considering their constitutional claim.[3] Appellees would be in no different posture in this case if they had all participated in arbitrations and had been awarded every dollar claimed.

2.a. Appellees suggest (Mot. to Aff. 17-18) that the Article III claim is especially strong because the arbitrators will be adjudicating state law trade secret rights. The premise of this argument, however, is faulty. Appellees' claim is that the data may contain valuable trade secret techniques protected by state law; however, the compensation under the

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and conclusions of law were entered by the court on appellees' post-judgment motion under Rules 52(b) and 59(e), Fed. R. Civ. P., to alter or amend the judgment. The government opposed the entry of such findings and conclusions as inappropriate; alternatively, on the premise such action was warranted, the government objected to several conclusions of law as inconsistent with the previously entered judgment. While the government did state that it agreed "that no genuine issue as to any material facts exist in this action and *accordingly* does not contest any of plaintiffs' proposed findings of fact," the government expressly stated that "defendants in no way waive[d] their right to challenge all conclusions of law as well as certain factual findings on their appeal of the judgment of the Court." Memorandum of Law in Opposition to Plaintiffs Motion to Amend Judgment at 2, 3 & nn. *, * * (Aug. 29, 1984) (emphasis added).

[3]It is no excuse, as appellees suggest (Mot. to Aff. 14-15), that the statute limits judicial review of the award. Appellees' constitutional claim is that the arbitration scheme with the limitation on judicial review is unconstitutional. Contrary to what appellees appear to believe, there is no reason why a party seeking a declaration that a statute is invalid cannot ask for relief that may have been barred by the statute the party seeks to invalidate. This Court's decision in *Monsanto* requires a data submitter to exhaust the arbitration remedy before presenting constitutional attacks on the statutory process; appellees should not be allowed to evade this requirement by hiding behind the very statutory provision that is alleged to be unconstitutional.

statute is for the subsequent applicant's reliance on the data to obtain a registration, and not for its disclosure. Indeed, the subsequent applicant normally does not see the data but merely cites data referred to in a catalog compiled and published by EPA. Furthermore, if the subsequent applicant is a multinational firm, that company is prohibited by the statute from obtaining the data. 7 U.S.C. 136h(g). The right that is adjudicated in the arbitration is the federal right to compensation under the federal statute, not any right to trade secret protection provided by the state law. See *Monsanto*, slip op. 31. Consequently, the arbitrators are unlikely to decide any state law questions, much less any state law rights.

b. Appellees also argue (Mot. to Aff. 21-22) that their claim of improper delegation of legislative authority, which was not adjudicated below, would support the judgment. The gist of appellees' assertion is that Congress failed to provide standards for measuring the compensation due under the statute. There is no basis for this contention. The compensation provision was inserted in the statute in 1972, and provided for the right to "reasonable compensation for producing the test data to be relied upon." Pub. L. No. 92-516, § 3(c)(1)(D), 86 Stat. 979. The stated purpose was to spread the costs of data development (S. Rep. 92-838, 92d Cong., 2d Sess., Pt. II 69 (1972)). The intended measure of compensation was plainly the equitable division of those costs. In 1978, Congress substantially altered the procedural aspects of the arbitration and compensation scheme, assigning the determination of the amount of compensation to the parties and the arbitrators rather than to EPA. It is clear from the legislative history, however, that no change was intended in the expected measure of compensation. See S. Rep. 95-334, 95th Cong., 1st Sess. 7-8 (1977); 123 Cong. Rec. 25706 (1977) (emphasis added) (the scheme "protects the data developer's right *to recover his data generation costs* * * *") (remarks of Sen. Leahy).

c. Finally, appellees assert (Mot. to Aff. 28-29) that if FIFRA's severability clause is used to strike down the limitation on judicial review it will not have the effect of permitting judicial review of the award by an Article III court. This contention has no merit. Under 28 U.S.C. 1331 the district courts are vested with subject matter jurisdiction to enforce and review an arbitration award mandated by federal statute, and a cause of action to enforce or review an arbitration award may readily be inferred from the remainder of the statute and its history. See *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979). Nor does *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), cited by appellees (Mot. to Aff. 28), stand for the broad proposition that there is no right of review of an arbitrator's decision under 28 U.S.C. 1331. That decision rested on the special circumstances surrounding jurisdictional disputes between labor unions and the clear congressional intent that such controversies be settled as promptly as possible. 320 U.S. at 301-303. No such considerations apply here. Indeed, the fact that FIFRA as written permits judicial review in limited circumstances evidences a general understanding that a cause of action would ordinarily exist if those limitations no longer applied.

For the foregoing reasons and those presented in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted. The Court may wish to consider summary reversal.

REX E. LEE
Solicitor General

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